Supreme Court, U. S.
FILED
APR 4 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1416

PASQUALE TEMPORALE, Petitioner,

VS.

STATE OF CONNECTICUT, Respondent.

APPENDIX TO

PETITION FOR A WRIT OF CERTIORARI TO THE

SUPREME COURT OF THE

STATE OF CONNECTICUT

JOHN R. WILLIAMS
265 Church Street
New Haven, Connecticut 06510
Telephone: 203-562-9931

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

Page

Decision of Connecticut
Supreme Court 1a

Decision of Appellate Session
of Connecticut Superior Court 2a

Petitioner's Motion in Arrest
of Judgment in Trial Court 18a

Trial Court's Memorandum of Decision
Re: Motion to Set Aside Verdict
and Motion in Arrest of Judgment 20a

STATE OF CONNECTICUT V. PASQUALE TEMPORALE

March 7, 1978. The petition by the defendant Pasquale Temporale for certification for appeal from the Appellate Session of the Superior Court is denied.

Dowling
Reporter of Judicial
Decisions

APPELLATE SESSION OF THE SUPERIOR COURT
September, 1977, at Hartford

A.S. 333

STATE OF CONNECTICUT V. ANTHONY TEMPORALE

A.S. 334

STATE OF CONNECTICUT V. PASQUALE TEMPORALE

Argued: September 29, 1977 Decided: January 6, 1978

Information in two counts charging the defendants with the crimes of (1) breach of the peace and (2) interfering with an officer, brought to the Court of Common Pleas in the fourth geographical area and tried to the jury before Pickett, J.; in the first case verdict and judgment of guilty as to the second count only and in the second case verdict and judgment of guilty on both counts; appeal by both defendants. No error on the first count of the second case. Error; new trial on the second count of each case.

John R. Williams, for the appellants (defendants).

Robert E. Beach, Jr., assistant state's

attorney, for the appellee (state).

SPONZO, J. The defendant, Pasquale Temporale, was found guilty of the crime of breach of peace in violation of §53a-181 of the General Statutes and both defendants were found guilty of interfering with an officer in violation of 53a-167a of the General Statutes. Both defendants have appealed and have assigned as error (1) the unconstitutionality of both statutes, (2) violation of their constitutional right to free speech, (3) denial of due process of law by the court in refusing a recess, (4) failure to charge the jury on a property owner's right to defend against a trespass, (5) improperly charging the jury on the issue of resisting arrest, and (6) refusal to set aside the verdicts of guilty.

The jury could reasonably have found from the evidence produced during the course of the trial the following facts: On February 21, 1976 at about 8:30 p.m., a rock concert was in progress at the Palace Theater, located on East Main

Street, Waterbury, Connecticut. This theater was owned by Dominic Temporale, father of the defendants, Pasquale and Anthony. At the time of the alleged offenses, the father, who was on vacation in Florida, had placed the older son, Anthony, in charge of the theater and Pasquale in charge of tickets. The rock concert was sold out and the theater accommodated approximately 3000 persons. There were several hundred persons milling around in the lobby when two plain-clothed Waterbury detectives entered the lobby of the theater. One of the detectives, Robert Little, had been contacted by an officer on duty inside the theater and this officer gave the detective a bag of suspected marijuana. Little and his fellow detective were on duty outside the theater upon order of the police superintendent. Upon receipt of the suspected marijuana, both detectives decided to enter the theater to investigate. They approached Pasquale Temporale, identified themselves as police officers, showed their badges

informed him that they were there on official business. Pasquale responded, "No f---ing narcs are coming in this place." Little advised him they were investigating and "to take it easy" since there were hundreds of persons in the lobby. Pasquale was "hollering" and shoved Little out the door at which time he was placed under arrest. He continued to scream, curse, throw punches and back into the ticket booth. Detective Little and his companion, Detective Calabrese, felt that a "touchy" situation was developing and decided they should remove Pasquale and themselves from the lobby as soon as possible.

It was at this point that Anthony Temporale became involved. He told the detective to "take your f---ing hands off him." Anthony managed to get between the officers and his brother and this allowed Pasquale temporarily to get away. He was cursing the officers in a loud voice and, while being subdued, struck several officers. Anthony knew that Little was a police officer.

Pasquale testified he did not know that Little and Calabrese were officers but thought they were civilians trying to "crash" the concert. He claims he put his arm out to stop them from coming through.

I

In their first assignment of error the defendants contend that §§53a-167a and 53a-181 are unconstitutionally vague and overbroad. It is their claim that the legislature unconstitutionally delegated their power of legislation to courts, juries and police officers in failing to fix specific standards the public has been left uncertain as to what conduct is prohibited or not prohibited in each particular case. The defendants are correct in stating the law to the extent that penal statutes must be sufficiently certain so as clearly to define the conduct to which its prohibitions are addressed. State v. Clemons, 168 Conn. 395, 400. Section 53a-181[1] was carefully drafted so that it did not infringe on one's

first amendment rights. It is easily distinguishable from other statutes which have been found unconstitutional because it included the clause at the beginning "with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof." This clause applies the specificity and limitation required to protect the right of free speech and also to apprise the public of what acts are prohibited. Prior to the adoption of the Penal Code in Connecticut, the breach of peace statute was found to be constitutional. State v. Van Allen, 140 Conn. 586, 589. At that time (1954) the statute did not require a specific intent. Similarly, in State v. Sweeney, 157 Conn. 485, 489 the disorderly conduct statute was upheld. In State v. Anonymous, 6 Conn.Cir.Ct. 667, 669, it is stated: "But even the most carefully drafted statutes leave considerable room for interpretation. It is not an easy task to select terms which will cover unjustified behavior while safeguarding the right to

say unpopular things. It would be practically impossible to specify precisely the degree of shocking impropriety, but the constitutional problems are minimized because the challenged sections of the Penal Code require 'intent' as an element of the offense."

Section 53a-167a[2] is not void because of vagueness or overbreadth. In a recent decision of this court this statute was considered in detail and one of the conclusions reached provided that intent was an essential element to be proved by the state. State v. Anonymous, 34 Conn. Sup. 531, 543. This statute, as well as § 53a-181 of the General Statutes, adequately meets the standards necessary to protect the constitutional rights of the public.

II

In the next assignment of error the defendant, Pasquale Temporale, contends that his first amendment right to freedom of speech was violated. In support of his contention this defendant cites

numerous cases. Hess v. Indiana, 414 U.S. 105; Cohen v. California, 403 U.S. 15; Bachellar v. Maryland, 397 U.S. 564; Brandenburg v. Ohio, 395 U.S. 444. The defendant is in error in attempting to equate the present case with those cases just cited. The United States Supreme Court has made it abundantly clear that not all speech is constitutionally protected. There are exceptions such as the situation of a "clear and present danger." Schenck v. United States, 249 U.S. 47. There is the "fighting words" exception which is likely to cause breach of the peace. Chaplinsky v. New Hampshire, 315 U.S. 568, 571-73. In these situations our Supreme Court has held that speech contributes nothing to the exposition or conveyance of ideas and does contribute to violence.

In the instant case the jury could easily conclude that the actions and words of Pasquale Temporale did contribute to violence and were not designed to express or convey ideas, such as are

protected by the constitution. In evaluating the conduct of this defendant the jury had the right to consider the totality of the circumstances, such as the type of concert being conducted, the size of the audience, namely 3000 people, the several hundred persons milling around in the lobby and unable to enter, the presence of suspected marijuana, the shoving of an officer by the defendant and the loud and abusive language uttered by the accused. These circumstances lend support for the conviction of Pasquale Temporale on the charge of breach of peace and in no way was his right to freedom of speech infringed upon.

III

The next assignment of error is concerned with the refusal of the court to recess the trial for four hours in order to permit the defendants to produce a witness. The accused contend that they were denied an opportunity to present an important witness and that this ruling denied them that due process guaranteed by the sixth and

fourteenth amendments of the United States Constitution. On the second day of the trial, after all witnesses had testified for the defense, counsel for the accused requested a continuance for approximately four hours and stated as a reason that the prospective witness was a resident of New York and not subject to the subpoena powers of this state. The name of the witness was given to the court and, in response to a question of the trial judge, counsel for the defendants stated that this witness would testify that the police did not identify themselves when entering the theater and that he observed the entire sequence of events which formed the basis for the arrests. This expected testimony would corroborate the testimony of the accused. The request for a recess was denied.

Ordinarily, the issue of recesses and continuances is within the discretion of a trial judge. State v. Bethea, 167 Conn. 80, 84. This is necessary in order to guarantee the effective and

orderly progress of trial dockets. It is a discretion that must be exercised with reason and not in an arbitrary fashion. At times it is one of the most difficult decisions to make because of large dockets which exist in many localities and the demand for speedy trials. In reviewing the decisions of trial judges it is necessary to examine all the circumstances then and there existing and at the same time make a determination whether the constitutional rights of an accused to a fair trial have been violated. In Ungar v. Sarafite, 376 U.S. 575, 589 it is stated "There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied."

"This court must make every reasonable presumption in favor of the proper exercise of the trial court's discretion." State v. Jeustiniano,

38 Conn.L.J., No. 29, pp. 5, 8. There must be some indication that the proffered evidence would aid the accused in their defense. The statement made to the trial judge by defendants' counsel suggested that the evidence would merely be corroborative.

We find that the denial of a continuance by the trial judge was within his discretionary powers.

IV

At this time we shall consider the next two assignments of error together because they concern the refusal of the court to charge on a property owner's right to defend against a trespass and the charge of the court on resisting arrest.

The defendants presented evidence to the effect that they did not know that the detectives were police officers and thought that they wanted to gain entrance to the rock concert unlawfully. While there was considerable evidence presented to the effect that the police officers had iden-

tified themselves as such and were in the performance of their duties, it was necessary that the court charge the jury on the provisions of §53a-20[3] of the General Statutes.

Anthony Temporale testified that he was placed in control of the premises by his father, who was in Florida at the time of this incident. Pasquale was placed in charge of selling tickets. The court properly charged on §53a-23 of the General Statutes which provides that "a person is not justified in using physical force to resist an arrest by a reasonably identifiable peace officer, whether such arrest is legal or illegal." There was sufficient evidence presented by the state to justify this charge. If the defendants did not know that Detectives Little and Calabrese were police officers and if they thought they were intending to crash into the concert, that would have been evidence for the jury to consider on the issue of trespass and the failure to charge on §53a-20 did constitute prejudicial

error. If the jury believed a criminal trespass was being committed, the defendants could have found to be justified in using reasonable physical force upon Little and Calabrese. State v. Anonymous, 34 Conn.Sup. 531, 545-47.

V

The last assignment of error requires little discussion. The trial court was not in error in refusing to set aside the verdict of guilty of the charge of breach of peace in the case of Pasquale Temporale. There was ample evidence to support this verdict.

There is no error in the verdict and judgment of guilty of the charge of breach of peace as to Pasquale Temporale; there is error as to the charge of interfering with a police officer in each case. The judgments of guilty of the charge of interfering with a police officer are set aside and the cases are remanded for a new trial.

In this opinion Healey and Parskey, Js.,

concurred.

Sponzo, J.

Date of Judgment January 6, 1978.
Counsel notified January 6, 1978.

Thomas H. Abraham
Clerk

Footnotes:

1. "[General Statutes] Sec. 53a-181. BREACH OF PEACE: Class B Misdemeanor. (a) A person is guilty of breach of peace when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he: (1) engages in fighting or in violent tumultuous or threatening behavior in a public place; or (2) assaults or strikes another; or (3) threatens to commit any crime against another person or his property; or (4) publicly exhibits, distributes, posts up or advertises any offensive, indecent or abusive matter concerning any person; or (5) in a public place, uses abusive or obscene language or makes an obscene gesture; or (6) creates a public, hazardous or physically offensive condition by any act he is not licensed or privileged to do."

2. "[General Statutes] Sec. 53a-167a. INTERFERING WITH AN OFFICER: Class D felony. (a) A person is guilty of interfering with an officer when he obstructs, resists, hinders, endangers or interferes with any peace officer or fireman in the performance of his duties."

3. "[General Statutes] Sec. 53a-20. USE OF PHYSICAL FORCE IN DEFENSE OF PREMISES. A person in possession or control of premises, . . . is

justified in using reasonable physical force upon another person when and to the extent that he reasonably believes it is necessary to prevent or terminate the commission or attempted commission of a criminal trespass by suth other person in or upon such premises. . . ."

NO. CR4-55153 : COURT OF COMMON PLEAS

STATE OF CONNECTICUT : G.A. 4

VS. : AT WATERBURY

PASQUALE TEMPORALE : MAY 14, 1976

MOTION IN ARREST OF JUDGMENT

Defendant moves in arrest of judgment as to the charge of breach of the peace for the following reasons:

1. The statute upon which the information is based is unconstitutionally vague, in that it

a.) does not provide a standard to guide this Court in determining guilt or innocence;

b.) does not provide the defendant with adequate notice as to what conduct is prohibited to serve as a guide for his conduct;

c.) does not inform defendant of the prohibited acts with the specificity necessary for the defendant to prepare his defense;

2. A conviction upon the information in the proceeding would violate the due process and equal protection clauses of the Fourteenth Amendment to

the United States Constitution.

WHEREFORE, defendant respectfully requests that judgment be arrested and that he be discharged.

THE DEFENDANT

BY_____
Norman J. Johnson
His Attorney

CR4-55152 : COURT OF COMMON PLEAS

STATE OF CONNECTICUT :

VS. : G.A. 4

ANTHONY TEMPORALE :

CR4-55153 :

STATE OF CONNECTICUT : WATERBURY, CONNECTICUT

VS. :

PASQUALE TEMPORALE : MAY 24, 1976

MEMORANDUM OF DECISION RE: MOTION TO SET ASIDE VERDICT AND MOTION IN ARREST OF JUDGMENT

The defendants, Anthony Temporale and Pasquale Temporale, brothers aged twenty-one and nineteen respectively, were arrested and charged with having committed the crimes of Breach of Peace, Section 53a-181 and Interference, Section 53a-167a. The crimes allegedly took place at the Palace Theater in Waterbury on February 21, 1976, where a well attended rock concert was taking place. After a trial by jury, Pasquale was found guilty of both counts and Anthony of Interference only.

I

Each defendant has filed a motion to set aside the verdict and the defendant Pasquale has also filed a motion in arrest of judgment. See P.Bk. Sec. 354. Insofar as this motion is concerned, it is based upon the claim that Section 53a-181, Breach of Peace, is unconstitutional in that "it does not provide a standard to guide (the) court in determining guilt or innocence"... etc. At first, it should be noted that this defendant did not file a motion for a bill of particulars. P.Bk. 495; State vs. Coleman, 167 Conn. 260, 268, nor did he request the state to specify the particular sub-sections it was proceeding upon. Aside from that, there is involved a statute of long standing prohibiting certain conduct which has not been effectively challenged. The lesser offense of disorderly conduct has also been held constitutional. State vs. Aunayim, 24 Conn. Sup. 7, 12. For this legislative court to make a determination of unconstitutionality in

in the face of history and legal precedent would be improper. See State v. Anonymous, 6 Conn.Cir. 402; see also Szarwak v. Warden, 167 Conn. 10. No claim has been advanced that the conduct was constitutionally protected. 12 Am.Jur.2d S 13. Clearly, the evidence of language addressed to Detective Little that "no ---- narks are coming in here", was in and of itself, sufficient for a conviction on this charge. Cantwell v. Connecticut, 310 U.S. 296, 84 L.Ed. 1213, 60 S.Ct. 900.

II

Each defendant moves to set aside the verdict on the grounds that it is against the weight of the evidence, the state did not make out its case beyond a reasonable doubt as a matter of law, and no jury could have failed to have a reasonable doubt. As to the second and third claims, it is sufficient to note that the jury which heard these cases found Pasquale guilty of both counts and Anthony of one count and therefore, it did in fact find guilt beyond a reasonable doubt.

Proof beyond a reasonable doubt does not require proof beyond possible doubt. State v. Benton, 161 Conn. 404, 409; State v. Smith, 378, 387.

As to the first claim that the verdict was against the weight of the evidence, it is rejected. "A verdict must stand if the jury could reasonably have concluded that the cumulative effect of the evidence established guilt beyond a reasonable doubt" State v. Benton, supra Pg. 410. The difficulty with the position of the defendants is that an impartial jury of their peers in their reflective judgment have chosen, after hearing all the evidence, the arguments of counsel and the charge of the court, to find each guilty of interference and Pasquale guilty of both. As in most cases, the issue of credibility of witnesses was of prime importance. Having had their day in court, neither defendant upon the evidence presented is entitled to any relief.

The motion in arrest of judgment of the defendant Pasquale Temporale and the motions to

set aside the verdict as to each defendant are denied.

Pickett, J.